Supreme Court, U.S.
FILED
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(2)

No. 91-1689

In The

Supreme Court of the United States

October Term, 1991

WILLIAM S. PATTERSON,

Petitioner,

v.

JOHN KEANE, Superintendent, Sing Sing Correctional Facility, Ossining, New York,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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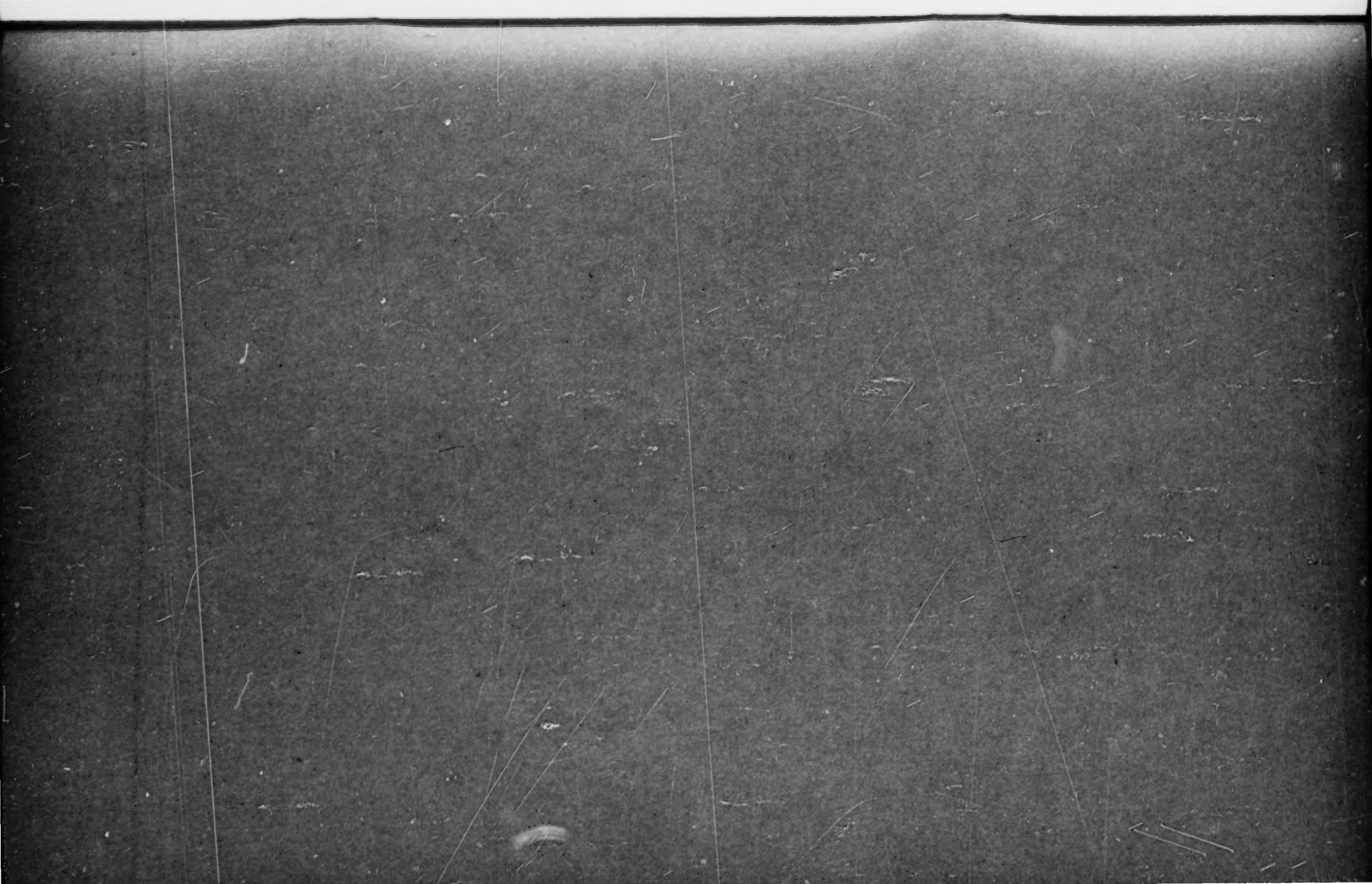

QUESTIONS PRESENTED

1. Did the District Court err in giving due deference to the State Court's factual finding, following a full evidentiary hearing, that police reports provided to the defense were the "duplicative equivalent" of a detective's discarded preliminary notes?

2. Did the District Court err in concluding that Petitioner has failed to sustain his burden of establishing that he was prejudiced by the unavailability of those notes at trial?

3. Did Petitioner establish that the issue presented satisfies the standard for issuance of a certificate of probable cause?

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent respectfully requests that this court deny the petition for a writ of certiorari, seeking review of the Second Circuit's denial of petitioner's application for a certificate of probable cause to appeal to the order of the United States District Court for the Eastern District of New York, which denied a petition for a writ of habeas corpus.

OPINIONS BELOW

The order of the United States Court of Appeals for the Second Circuit is reproduced in petitioner's appendix. No opinion accompanied this order. The decision and order of the United States District Court for the Eastern District of New York, not reported, is reproduced in petitioner's appendix.

Petitioner invokes the jurisdiction of this Court under the authority of 28 US.C. Section 1254(1).

STATUTES INVOLVED

28 U.S.C. Section 2254(d)

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidence by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit –

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

PRELIMINARY STATEMENT

Petitioner was convicted, following a trial by jury, of the crime of Murder in the Second Degree, in violation of New York Penal Law Section 125.25(1). On February 26, 1985, he was sentenced by the County Court, Suffolk County (Namm, J.) to an indeterminate sentence of 25 years to life. On February 16, 1988, the judgment of conviction was affirmed by the Supreme Court, Appellate Division, Second Department. *People v. Patterson*, 137 A.D.2d 729, 524 N.Y.S.2d 814 (2d Dep't 1989). Leave to appeal to the New York State Court of Appeals was denied on April 12, 1988 (71 N.Y.2d 972 [1988] [Kaye, J.]).

During the pendency of his direct appeal, Petitioner filed two *pro se* motions in Suffolk County Court to vacate the judgment of conviction on numerous grounds, including that the trial testimony of the arresting detective concerning the destruction of his interrogation notes was knowingly false, that destruction violated Departmental policy and that the unavailability of the original notes violated his right to due process. Both of these motions were denied by the trial court on procedural grounds; the appearance of sufficient facts in the record on appeal would permit resolution of these issues of credibility in the context of that appeal.

On direct appeal to the New York State Supreme Court, Appellate Division, Second Department, Petitioner, to the extent relevant to this petition, claimed that police misconduct constituting a violation of New York's so-called *Rosario* rule so permeated the proceedings as to deprive him of a fair trial.

In support of the present application, Petitioner once more focuses on the alleged violation of his right to due process by the claimed bad-faith destruction of the arresting officer's original notes, which the State trial judge found had been fully incorporated into his reports and which were turned over to defense counsel.

In brief, Respondent maintains that even if Petitioner is assumed to have exhausted his State remedies with respect to this claim, his Constitutional rights were not violated. He has failed to establish the prejudicial effect of the conduct complained of or that there exists a significant probability that the availability of the arresting officer's original notes would have changed the outcome of the State proceedings.

STATEMENT OF THE CASE

Frances Patterson was killed on the night of June 27, 1982. The first aid crew and the police initially were unable to determine what type of weapon she had been shot with, in part due to the fact that the bullet had deflected off her left jaw.

At 8:23 a.m. the following day, the police observed a white and maroon Chevrolet Citation traveling north on the victim's street and come to a "jolting" or sudden stop in the middle of the street. Petitioner got out of the car. He was very excited, and after telling the police officers present that he had just come up from the south, he repeatedly asked what had happened to his wife.

Officers at the scene only told Patterson that an incident had occurred. Petitioner, at one point, asked "Was she sh – "?.

Patterson voluntarily accompanied police officers to a police station, where he told Detective Robert Amato he wanted to help. Petitioner stated that he had been married to Frances Patterson for fifteen years, and that they had two children. He and Frances Patterson had grown apart, she wanting to stay at home, he required to entertain as part of his job, and they had separated in January, 1982. He characterized the separation as amicable. He also told Amato he had been very generous to Frances Patterson regarding alimony and child support.

The separation was not because of another woman, Petitioner having been faithful to his wife until the separation. He said, however, that he intended to marry Tricia Martin, a woman with whom he was living in Jonesboro, Georgia. He noted that due to his inability to make support payments, he was filing for bankruptcy.

Amato asked Petitioner if he owned any guns, without specifically referring to a rifle. He responded that he had never owned a rifle, fired a rifle, or even held a rifle; he went on to denying ownership of a pistol, shotgun, or ammunition, except an air rifle, stating that he disliked guns. He explained that even in Air Force Basic Training, he had been instructed on BB guns.

Amato then asked Petitioner to take a firearms discharge residue test (FDR), to eliminate him as a potential suspect. Patterson refused, fearing that the police would try to "to pin it (the murder) on me".

Amato next asked Petitioner about his movements prior to his arrival at his wife's house on the morning of June 28, 1982. Patterson told him he had gone rafting on June 26th with Tricia Martin and two other couples in North or South Carolina. They had left there for the return to Georgia in the early evening; after dropping Martin at her mother's house (where her child was), he had gone to her house to sleep before driving to New York for his bankruptcy hearing. Unable to sleep, he left Georgia about 10:00 p.m. on the 26th.

He arrived in New York at about 6:30 p.m. and drove to Cedar Road, the street behind the former marital residence. He arrived there at 7:00 p.m. or 7:30 p.m. and then walked across a large playing field, walked to the fence dividing the school from his wife's property, and using a tree and the fence, climbed over the fence and into his backyard. He then went to the rear window closest to the back door and looked in through a crack in the shutters. He saw his estranged wife seated on a couch, and his children on the floor. All three were watching television.

After staying some thirty to forty seconds, petitioner re-traced his steps to his car, and drove to a Kings Dairy location on East Deer Park Road, where he tried to sleep. Because of the traffic noise, however, he drove to a rest area on the Long Island Expressway, where he spent the night. He awoke at 7:30 a.m., drove back to East Deer Park Road, stopped at a coffee truck, bought coffee, a roll and a newspaper.

Petitioner then became worried about his wife. He called her at exactly 8:00 a.m., checking his watch as he did so, from a phone booth near the coffee truck, some

five minutes from the house. Getting no answer, he assumed Frances Patterson was in the shower. He subsequently drove there, arriving around 8:30 a.m.

Amato then told Patterson he thought Petitioner killed Frances Patterson. He replied that Amato was crazy, that he was telling the truth, and that he was being treated like a criminal. He again stated he had never owned a rifle, held a rifle or fired a rifle. At this point, Petitioner still had not been told by anyone the manner in which Frances Patterson was killed.

Later Amato confronted Petitioner: "I think you killed your wife in front of your kids." Patterson replied, "Yeah. You prove that".

Patterson described what he saw through the rear windows. When a detective said that was impossible, Petitioner told him he had made his observations through the cracks in the shutters. When he was again told that it was impossible, he stated, "well, you want me to say I saw them through the front window."

A detective again asked if Petitioner had killed Frances Patterson. He reasserted that he did not own a rifle, or know how to shoot one. When the detective asked Patterson how he knew a rifle was used (a fact unknown to the officer himself until 8:30 p.m.), he responded that no one had told him so but, that he had assumed it was a rifle.

When the medical examiner performed the autopsy on June 28, 1982 in addition to discovering the physical cause for Frances Patterson's death, he ascertained that she had been killed with a high velocity weapon, but was

still not able to say whether it was a handgun or a rifle, or the caliber of the bullet. Later that same day, ballistics results revealed that Frances Patterson had been shot with a .35 caliber bullet which had been fired from a Marlin .35 caliber rifle, probably a Model 336, made after 1967. Investigating detectives were informed of this at 8:30 p.m., approximately thirty to sixty minutes after petitioner left the police.

After the bullet and weapon were identified, the police attempted to learn if and when the Petitioner had access to such a weapon. Detective Amato located H. Gerald Morris and his wife Kathy in Georgia. They testified that they sold a rifle of the type and model in question to Patterson on June 22, 1982, only five days before the murder, and that they procured ammunition for him at his request and gave that to him on June 24, 1982.

At trial Petitioner conceded that he bought the weapon but claimed that he did so earlier. Initially, Patterson testified that he purchased the rifle on or about May 13 and 14. Petitioner further stated that a few days later he talked to his fiancee, Patricia Martin and, based upon her abhorrence of guns, he sold the weapon to a John Finley. He first claimed to have done this by about May 19; he subsequently changed his testimony and claimed he bought the weapon on May 20 and sold it by June 8.

In support of the Morrises' testimony, a variety of witnesses and documents were used. The Morrises testified that when Petitioner bought the rifle he was driving a white-maroon Chevy Citation. It was established that

Patterson had left his car with his wife but, after being required to turn in his company car from previous employment, had taken the car back. Petitioner himself testified that when he took the Citation, he left a red station wagon for his wife's; that vehicle was already registered or was registered for her within one or two days.

However, records of the Department of Motor Vehicles of New York showed that the station wagon was not registered until June 11. Sue Ellen Martin, a former employee of Petitioner's company, testified that she was the person to whom he turned in the company car and that he had done so on either June 11th or June 12th. Patricia Martin, his former girlfriend, testified she had seen an "Atlanta Advertiser", with rifle ads underlined, in the Citation. This demonstrated that the earliest he could have had the car in which he purchased the rifle from Morris was June 11 or 12th, or at least four days *after* he claimed to have *sold* the rifle to John Finley. Sergeant Cahill of the Georgia Public Safety Commission also testified that Petitioner did not obtain his temporary Georgia license until May 27, one week *after* he claimed that a store in Georgia refused to sell him ammunition because he had a temporary license.

Of course, Detective Amato testified to his extensive unsuccessful efforts in Georgia and neighboring states to locate the individual to whom Patterson had allegedly sold the rifle.

Petitioner told the police that he had amicably separated from his wife, thus having no motive to kill her. At trial he produced evidence that they had agreed that she

would have custody of the children, an arrangement he approved. He also told the police that he had never been unfaithful to his wife until their separation. However, the testimony of various witnesses, including Petitioner, established that (1) he had been dating other women prior to his separation from his wife, (although he sought to explain that he did not consider that being unfaithful since she was aware of the relationships with these other women); and (2) Petitioner was not as favorably disposed to his wife's retaining custody of the children as he would have led the police and jury to believe.

Patricia Martin testified that on four or five occasions Patterson had discussed with her having the children live with them. Sue Ellen Martin, to whom he had surrendered the company car, said that he had characterized his divorce proceeding as bitter. Another former co-worker, Richard Hopping, testified that Petitioner had told him, although he did not take the statement seriously at the time, that if his wife did not grant him a divorce he would kill her. Petitioner was also aware of Mother's Day cards hand drawn by his children, which displayed a great deal of animosity towards him.

There was further evidence that, despite his representations that he sent his wife money and paid all the bills, their house was in disrepair.

Petitioner clearly had the opportunity to commit the crime. He admitted that he was on Long Island on the night in question; indeed, according to his own testimony, he was in the vicinity two hours prior to the murder. Prosecution witnesses testified that they saw a car similar to Patterson's pulling into the athletic field

area of a school abutting the scene of the murder and into the woods behind it at about the time of the shooting. Evidence at the scene, particularly the angle of the shot through the window and the degree of slope from the street to the foundation of the building, indicated that the shooter had to be no more than 10 feet from the window in the front yard, because the bullet could not have been fired from the street at the proper angle. However, the family dog, which was present in the house, did not bark even though there was someone outside the front window. Although Frank Patterson, Petitioner's son, tried to backtrack during his trial testimony, he had testified at the previous trial and had told Amato that the dog barked at everybody except members of the family.

Although not admissions in the classic sense, Petitioner's conversations with the police on June 28 also demonstrate internal inconsistencies, outright lies, and more knowledge than someone who was simply arriving at his ex-wife's house on the morning of June 28. Two of the first three policemen he encountered testified that as soon as Patterson arrived he told them that he had just come up from Georgia. This was clearly a lie. From the outset he inquired about his wife, not his children, a fact confirmed through the testimony of the defense witness, James O'Neil, a newspaper reporter who was at the scene.

Petitioner also collapsed periodically. On his own case he explained that he suffered from dizzy spells. However, police officers described his reactions as "theatrical" in nature. Moreover, on his application for his Georgia driver's license, he had indicated that he did not suffer from dizzy spells. After detectives told Petitioner

that his wife had been shot and had advised him of his constitutional rights, he was asked if he owned any *guns;* defendant said he had never owned a rifle, fired a rifle or held a rifle, *before* the police themselves knew what type of weapon was used to kill the victim. He subsequently said that he had never owned any other weapon except an airgun, which he told police he had never fired and didn't even know if the weapon was operable. During the trial he testified that he had said he had in fact fired an airgun.

During his conversation with the police, Patterson described seeing his wife and children through the rear window at about 7:30 P.M., watching television.

Evidence to the contrary came from various sources. While his son, testifying for the father, tried to establish that his mother and sister were in fact in the room at the time Petitioner claimed to have seen them, his prior testimony and his conversation with Amato on the night of the murder indicated that the family had not started to watch television until 8:00 o'clock. Therefore, he could not have seen what he claimed to have seen. This is, of course, in addition to his inability to see the scene he described because of the closed shutters on the back windows. He also changed the number of windows he looked through from one to two, during his discussions with the police. Petitioner *could* have seen what he described through the *front* window at the time of the shooting.

Detective Amato recovered two .35 caliber bullets from Patricia Martin's house two days later. Pictures of the garage taken at the time reveal that there was no shelf

where Patterson claimed to have stored the rifle between when he bought it and when he disposed of it.

When he was arrested, Petitioner remarked that he knew it would come to this.

REASONS FOR DENYING THE PETITION

THE UNAVAILABILITY AT TRIAL OF THE ARRESTING OFFICER'S ORIGINAL NOTES DID NOT VIOLATE PETITIONER'S DUE PROCESS RIGHTS, SINCE THEY WERE INCORPORATED FULLY INTO REPORTS PROVIDED TO THE DEFENSE

A. Failure to Exhaust

A review of the State appellate briefs as well as the hearing and trial transcript and argument of counsel below reveals that with respect to the specific allegations advanced herein, Petitioner largely limited his arguments to alleged violations of New York's *Rosario* (*People v. Rosario*, 9 N.Y.2d 286, 213 N.Y.S.2d 448, 173 N.E.2d 881 [1961]) rule, rather than of a particular Federal constitutional right. Therefore, Respondent maintained in the courts below that petitioner has failed to adequately exhaust his state remedies.

However, even assuming, for the purpose of this application only, that the District Court correctly rejected our contention concerning petitioner's failure to exhaust, we maintain that denial of the petition and of the subsequent application for a certificate of probable cause were correct and should not be reviewed.

B. New York Law

In *People v. Rosario, supra,* the New York Court of Appeals held that "a right sense of justice" entitles a defendant to inspect the prior statements of a prosecution witness, whether or not those statements vary from his direct testimony. Subsequently, this rule was refined to assure that a defendant "receives the full benefit of a . . . witness' statements for impeachment purposes" [*People v. Poole,* 48 N.Y.2d 144, 149, 422 N.Y.S.2d 5, 397 N.E.2d 697 (1979)] and clearly encompasses the notes of the police officer witness made in connection with defendant's arrest. However, one of the common sense limits to the strong presumption of discoverability of prior statements is that the prosecution is not required to produce statements that are "duplicative equivalents of statements previously turned over to the defense." *People v. Consolazio,* 40 N.Y.2d 446, 454, 387 N.Y.S.2d 62, 354 N.E.2d 801 (1976), cert.denied, 433 U.S. 914 (1977); see *People v. Payne,* 52 N.Y.2d 743, 436 N.Y.S.2d 271, 417 N.E.2d 564 (1980).

In *People v. Ranghelle,* 69 N.Y.2d 56, 511 N.Y.S.2d 580, 503 N.E.2d 1011 (1986), the Court of Appeals implicitly reaffirmed the continued vitality of this exception. While statements are not the "duplicative equivalent" of previously produced documents simply because they are "harmonious" or "consistent" with them (*People v. Consolazio, supra*), neither does their unavailability for actual comparison mandate a *per se* inference that defendant was denied a fair trial or the imposition of the ultimate sanction of reversal. See, e.g., *United States v. Bagley,* 473 U.S. 67 (1985); *People v. Paranzino,* 40 N.Y.2d 1005, 391 N.Y.S.2d 391, 359 N.E.2d 981 (1976); *People v. Pawlowski,* 116 A.D.2d

985, 498 N.Y.S.2d 711 (4th Dep't 1986); cf., *United States v. Feola*, 651 F. Supp. 1068 (S.D.N.Y. 1987), aff'd 875 F.2d 857 (2d Cir. 1988). With these principles in mind, we now turn to Petitioner's specific allegation of police impropriety.

C. Amato's Discarded Fragmentary Notes

Detective Amato candidly conceded during the suppression hearing and the trial that, after organizing and rewriting his initial, fragmentary notes relating to his discussions with Petitioner, he discarded the originals.

Initially, it must be emphasized that Petitioner's characterization of these written materials, memorialized in part on matchbook covers, brown paper bags as well as more conventional note paper, as contemporaneous notes of Amato's interrogation of the defendant is, at least in part, incorrect. In response to defense counsel's question Amato stated that he wrote the notes "sometimes while I was speaking to him, sometimes in breaks in a conversation of [sic] when I left the room".

Significantly, Amato testified that during a flight to Atlanta, Georgia, *within four hours* of concluding his conversation with Petitioner, he began reorganizing and rewriting the material in a more legible and comprehensible format, repeatedly checking his new writing against his original notes for accuracy. Amato explained the reason he felt compelled to rewrite his notes, as well as the procedure he utilized, as follows:

> Q. Can you tell this Court what exactly you did on that flight down with regard to those original, so called original notes?

A. Those notes which were written on sheets such – memobook sheets and on 8 1/2 by 11 sheets and on various size pieces of paper and matchbook covers, whatever I laid them out and recopied those notes into a progressive memobook form pattern. Those original notes consisted of my own form of shorthand, which varies from time to time, cross hyphens out, half words, half sentences, one sentence being scribbled into another and I knew that three or four weeks down the road, may be less, I wouldn't be able to decipher those notes myself, so, I rewrote them into a more comprehensive and hopefully a more chronological form.

Q. Well, as you sit there now, is there anything that was in those original notes that was not recopied into the compiled notes that you wrote?

A. Absolutely not, Mr. Wilutis. I double checked and tripled checked each item as I entered them in.

Q. Where were all those notes recopies, where did that, physically, take place?

A. On the plane down to Atlanta.

Q. That was the same date that conversations occurred; that's correct?

A. Yes, sir, that's right.

* * *

Q. I believe you indicated some of those notes were destroyed after the reports were made; is that right?

A. I threw them away, yes, after they were transcribed onto the reports.

Q. Did you have an opportunity to compare those notes with what went on to your reports?

A. Absolutely, sir.

Q. And what, if anything, did you notice about the two?

A. Well, I made sure that the exact same form and content that was in my notes went into my reports." (H.361-362).

There can be no question that the original notes were fully incorporated into the retranscription and supplemental reports prepared by Amato. See, *United States v. Feola, supra,* at 1136. Thus, far from being presented with a situation where *all* notes relating to Amato's interaction with Petitioner had been destroyed, the *only* evidence presented *unequivocally* established the complete equivalency of the two sets of notes. Nor was there any indication that Amato did not have an independent recollection of the circumstances surrounding the arrest, referring to his notes only to refresh his recollection. See, *Paranzino, supra,* at 1006.

Notwithstanding Petitioner's repeated assertions that Amato's actions violated New York Law, it is evident that the State trial and appellate courts both concluded otherwise in this case. Indeed, Petitioner has cites neither State nor Federal authority compelling a contrary result.

In *People v. Martinez,* 71 N.Y.2d 937, 528 N.Y.S.2d 813, 524 N.E.2d 124 (1988) the New York Court of Appeals summarized the consequences of various types of *Rosario*

violations. With respect to loss of destruction of such material, the Court noted.

> Finally, there are cases where Rosario evidence has been lost or destroyed and cannot be produced (see, *People v. Haupt*, 71 N.Y.2d 929 [decided herewith]). Just as the People have a duty to produce Rosario material they also have a correlative "obligation to preserve evidence until a request for disclosure is made" (*People v. Kelly*, 62 N.Y.2d 516, 520; see also, *United States v. Bryant*, 439 F.2d 642; *People v. Saddy*, 84 A.D.2d 175). Thus, it is no answer to a demand to produce that the material has been lost or destroyed. If the People fail to exercise care to preserve it and defendant is prejudiced by their mistake, the court must impose an appropriate sanction. The determination of what is appropriate is committed to the trial court's sound discretion, and while the degree of prosecutorial fault may be considered, the court's attention should focus primarily on the overriding need to eliminate prejudice to the defendant (People v. Kelly, supra, at 520-52]). *Id.*, at 940.

In Petitioner's case, the sanction deemed appropriate by the trial court was permitting exhaustive exploration of the destruction of Amato's "scratch" notes during cross-examination and summation.

Amato's "scratch notes" were *Rosario* material (*Martinez, supra; People v. Rosado*, 160 A.D.2d 505, 554 N.Y.S.2d 168 [1st Dept. 1990]), but only until their retranscription into the notes ultimately turned over to defense counsel. Thus, the failure to preserve them did not constitute a violation of the rule calling for *any* sanctions, let alone reversal or vacatur of the conviction, since, as the trial

court found, the retranscribed notes actually turned over were the "duplicative equivalents" of the destroyed originals. The District Court gave appropriate deference to this finding of fact, affirmed by the State appellate court. See, *Tanner v. Vincent*, 541 F.2d 932, 937 (2d Cir. 1976), cert. denied 429 U.S. 1065 (1977); *United States ex rel Regina v. LaVallee*, 504 F.2d 580, 582 (2d Cir. 1976), cert. denied 420 U.S. 947 (1975); Cf. *United States v. Petrillo*, 821 F.2d 85, 88 (2d Cir. 1987).

D. Federal Rule

The analogous Federal rule relative to Jencks materials does not require a different result. Law enforcement personnel are not required to preserve scratch notes if they incorporate them into formal reports. *United States v. Elusma*, 849 F.2d 76 (2d Cir. 1988), cert. den. 489 U.S. 1097; *United States v. Gotchus*, 803 F.2d 74 (2d Cir. 1986).

Detective Amato described at length the manner in which he prepared the notes turned over to defense counsel. Counsel was given wide latitude to explore the circumstances and reasons for the retranscription of the notes, providing the jury with an adequate basis for assessing the credibility of the witness. There was no request for the instruction noted with approval as an appropriate sanction in *Martinez, supra*. However, defense counsel addressed the subject in his summation clearly focusing the jury's attention on this issue. See, *United States v. Miranda*, 526 F.2d 1319, 1328 (2d Cir. 1975), cert. den. 429 U.S. 821; *People v. Haupt*, 71 N.Y.2d 928, 528 N.Y.S.2d 808, 524 N.E.2d 129 (1988).

E. Due Process Claims

A prosecutor is under a duty to turn over, upon the request of defense counsel, evidence which is favorable to the accused. *Brady v. Maryland*, 373 U.S. 83 (1963). This obligation encompasses material evidence which serves to impeach the credibility of prosecution witnesses. *United States v. Bagley*, 473 U.S. 667 (1985). However, a claim premised on a violation of this principle requires a showing by petitioner that disclosure of the original notes to defense counsel could have produced a different result in the state court trial. See *Bagley, supra*. The District Court correctly concluded that

> "petitioner has been unable to raise even a colorable claim that the detective's discarded notes contained evidence favorable to the petitioner and material to his claim of innocence and that such exculpatory evidence was excluded in the transcribed notes." (App. 14).

In *Arizona v. Youngblood*, ___ U.S. ___, 109 S.Ct. 333 (1988), this Court considered the applicable constitutional standard when the state fails to preserve evidence that *might* be useful to a defendant. The lost evidence in *Youngblood* was clothing worn by the victim of a sexual attack containing semen stains, which the police failed to preserve for subsequent testing. The Arizona Supreme Court reversed the conviction on the ground that the prosecution had breached its constitutional duty to preserve the semen samples so that timely testing could have been performed, possibly resulting in the complete exoneration of the defendant. The problem in *Youngblood*, as here, was the absence of the evidence, thereby requiring courts to "face the treacherous task of divining the import

of materials whose contents are unknown and, very often, disputed." *California v. Trombetta*, 467 U.S. 479 at 486.

Given the speculative task of measuring prejudice – not the case where exculpatory evidence has been suppressed – the Court held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. *Arizona v. Youngblood*, 109 S.Ct. at 337. (See, also *United States v. Elusma, supra* 849 F.2d at 79, where, as here, retranscription of the original notes occurred the same day).

F. Bad Faith

The only source for Petitioner's contention that the original notes were discarded in bad faith is a quote attributed to Amato, after his retirement, appearing in a newspaper article, to the effect that "detectives routinely destroy notes before cases go to trial – since any notes that remain in a case file can be used by a defense lawyer". Aside from the obvious hearsay nature of his statement, gleaned from sources clearly outside the original record on appeal, it also proves too much. Clearly, in the instant case, Amato discarded only his fragmentary initial, *almost* contemporaneous notes but retained what he steadfastly maintained was a complete equivalent thereof and was, in fact, extensively cross-examined by defense counsel, largely with the *aid of those notes*. Amato's further aside in the same article, that "the less you take the better off you are", was likewise not adhered

to by him here, since he in fact turned over 35 pages of retranscribed notes to defense counsel.

As the District Court correctly observed, this newspaper account falls far short of establishing "bad faith" on Amato's part:

> "The quote attributed to the detective is not relevant to the issue presented in the instant claim. Detective Amato made no reference in the article to the *Patterson* litigation and spoke of "detectives" in general terms. In the *Patterson* litigation, Amato discarded his initial notes but retained a complete equivalent . . . which was turned over to defense counsel. However, even assuming, *arguendo*, an unprincipled motive for Amato's action, petitioner has failed, for the reasons discussed above, to show any prejudice inuring to petition as a result." (Petitioner's Appendix, App.16).

Moreover, as the State hearing court correctly found, the issue of the propriety of Amato's discarding of his original notes did not hinge on whether the Suffolk County Police Department had rules concerning the preservation on such notes and whether or not Amato had complied with them.

G. Officer Rubin's Lost Notes

The fact that, for reasons likewise fully explored at trial, Officer Rubin's original notes relating to this case were in his private automobile when it was stolen is a fortuitous circumstance hardly supportive of Petitioner's strident attempt to characterize the loss of the notes as "bad-faith".

H. Denial of Certificate of Probable Cause

Contrary to Petitioner's contention, the summary denial of a certificate of probable cause by the United States Court of Appeals for the Second Circuit meets the standards recently reiterated by this Court in *Lozada v. Deeds*, ___ U.S. ___, 111 S.Ct. 860, 861-62 (1991). The District Court correctly concluded that Petitioner has failed to establish either prejudice or prosecutorial bad faith. Unlike the alleged denial of the right to effective assistance of counsel, presented in *Lozada, supra*, Petitioner's claim here has never been *presumed* to be prejudicial.

Finally, the State Trial Judge (Namm, J.) herein was instrumental in initiating the investigation by the New York State Commission of Investigations, whose conclusions Petitioner invokes in support of his claims. Although Judge Namm referred Petitioner's case to the Commission (App. 21-22), it was never subjected to their scrutiny. Irrespective of merits of the Commission's findings with respect to other homicide cases, they clearly are immaterial to this application.

CONCLUSION

For the foregoing reasons, the questions presented should be answered in the negative and the petition should be denied in all respects.

Respectfully submitted,

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DATED: Riverhead, New York
May 20, 1992

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